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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHRISTINE DEAN et al.,

Plaintiffs and Respondents,

v.

HENRY AMADO et al.,

Defendants and Appellants.

A147660

(Contra Costa County
Super. Ct. No. MSC11-00011)

Defendants Henry Amado and Abacus Financial Group, LLC (Abacus) appeal a judgment confirming an arbitration award in favor of plaintiffs Christine and James Dean (together the Deans). Defendants contend: (1) the trial court erred in determining there was a valid binding arbitration agreement; or alternatively, (2) the matter must be remanded for the court to issue a statement of decision. We reject the contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2011, the Deans filed an action against Abacus and its two members, Amado and Sharon Hinchman, alleging defendants failed to repay a \$100,000 loan.¹ The Deans requested a jury trial.

The parties participated in a mediation in May 2012 and a settlement conference in September 2012, but the case did not settle. On May 22, 2014, defendants' attorney Donald Tenconi sent the Deans' attorney Bruce Zelis an email stating, "This confirms

¹ Hinchman has not joined this appeal.

that we have agreed to binding arbitration before Judge Linda DeBene at JAMS. [¶] My clients are solely responsible for the first \$3,000 plus the \$400 administrative fee. Any sums beyond this will be allocated by the arbitrator. [¶] . . . [¶] You also authorize me to notify the Court that we will not move forward with the trial.”

A few weeks later, Zelis and the Deans signed a JAMS Stipulation for Arbitration form stating the parties stipulated to submit their disputes “to neutral, binding arbitration” and “to give up any rights . . . to have this matter litigated in a court” It appears JAMS did not obtain a signed stipulation from Tenconi and defendants.

Thereafter, JAMS sent Tenconi and Zelis a letter confirming the commencement of arbitration and appointment of Michael Ornstil as the arbitrator. The letter stated, “This arbitration shall be conducted in accordance with JAMS Streamlined Rules or other as agreed upon by the parties,” and referred the parties to the Streamlined Rules on the JAMS Web site. Rule 1 provides that the Streamlined Rules “govern *binding* Arbitrations of disputes or claims . . . administered by JAMS and in which the Parties agree to use these Rules”² (Italics added.)

The parties participated in arbitration before JAMS on May 5, 2015. The Deans appeared with Zelis, and Amado and Hinchman appeared with Tenconi. The Deans, Amado, Hinchman, and another witness testified, and the attorneys argued their positions. After the parties submitted postarbitration briefs, the arbitrator issued an 11-page interim award containing detailed findings and analyses. The arbitrator found defendants owed the Deans \$100,000 plus interest, and stated that a final award would follow after counsel addressed the issue of interest.

While awaiting the final award, Zelis sent Tenconi a letter containing a proposed joint status conference statement to inform the trial court that a “stipulated binding arbitration” had occurred and an interim award had issued, and that the parties were

² We grant defendants’ unopposed request for judicial notice of the JAMS Streamlined Rules effective July 1, 2014.

requesting a 30-day continuance of the status conference. Tenconi struck out the sentence referencing “stipulated binding arbitration.”

The parties ultimately submitted separate status conference statements. Zelis’s statement provided that the parties had engaged in “Binding Arbitration”; he attached the JAMS stipulation, the interim award, and the version of Zelis’s letter containing Tenconi’s strikeout. Tenconi filed a statement in which he joined in the request for a continuance. He explained he struck out the sentence characterizing the arbitration as “binding” because “I . . . disagreed with [it].”

On September 29, 2015, the arbitrator issued a final award finding defendants owed the Deans \$165,835.62 including interest through September 1, 2015, and \$27.39 per day thereafter, “until the date this Award is satisfied.”

The Deans petitioned to confirm the award. They attached Tenconi’s May 22, 2014 email to Zelis “confirm[ing] that we have agreed to binding arbitration” and that they would not go forward with the trial. They also attached rule 1 of the JAMS Streamlined Rules, the JAMS letter confirming the commencement of the arbitration and referencing the JAMS Streamlined Rules, and the final arbitration award.

Defendants filed a “request for trial de novo after non-binding arbitration.” The Deans opposed the request, asserting Tenconi “should be ashamed of himself for labeling this matter as having gone to ‘non-binding’ arbitration” where there was no question the arbitration would be binding. The Deans argued: (1) “ ‘we’ had agreed to ‘binding’ arbitration”; (2) defendants paid the entire arbitration fee; (3) the JAMS Streamlined Rules were “clearly stated” in the engagement letter; (4) at no time did defendants or Tenconi ever object or claim the arbitration was not binding; and (5) defendants are estopped from objecting to binding arbitration.

Defendants then filed a petition to vacate the arbitration award. Tenconi declared that at the time he sent the May 22, 2014 email “confirm[ing] we have agreed to binding arbitration,” he “believed Defendants would agree to binding arbitration but they never did.” He further declared: “None of the Defendants ever signed any agreement to participate in any arbitration that was binding or would be binding,” and “I participated in

what I always believed to be non-binding arbitration and hoped it would help achieve a mutually acceptable settlement.”

Defendants also submitted almost identical declarations from Amado and Hinchman, who declared they had never “agreed to binding arbitration,” never “authorized my attorney, or anyone else, to agree to binding arbitration on my behalf or on behalf of Abacus,” never “signed any agreement to participate in any arbitration that was binding or would be binding,” and “participated in and paid for what I always believed to be non-binding arbitration with the hope it would help achieve a mutually acceptable settlement.”³

Thereafter, the Deans filed further objections. They argued that defendants’ declarations were “disingenuous” and “self-serving” and that it was not credible that “they knew nothing about the arbitration being binding but thought it was just a settlement tool.” “The Arbitrator explained at the outset of the proceeding that this [was] an Arbitration and that his duty was similar to a Judge in that he would take testimony, and accept evidence during the proceedings. He further explained that he would render his ‘decision’ 30-days after the lawyers submitted their post-arbitration briefs.” The Deans argued the evidence showed defendants accepted and ratified their attorney’s stipulation to binding arbitration.

Defendants submitted supplemental declarations by Tenconi, Amado, and Hinchman. Tenconi’s declaration stated he never provided a copy of the JAMS Streamlined Rules to defendants and never obtained an agreement from them to be bound

³ The Deans have requested judicial notice of a December 12, 2016 declaration by Hinchman stating she and Amado actually knew the arbitration would be binding and that the declarations defendants submitted on her behalf are false, and her signatures forged. We deny the request because the evidence was not before the trial court when it rendered its decision. (See *Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 813 [reviewing courts generally do not take judicial notice of evidence not presented to the trial court].) We also deny the Deans’ request for judicial notice of a JAMS document entitled “Request for Missing Items” because the document was not presented to the court before judgment was entered. (*Ibid.*)

by the rules, “especially the word ‘binding’.” Amado’s and Hinchman’s declarations were again essentially the same, stating they never received a copy of the JAMS Streamlined Rules, that no one read the rules to them, and that they never agreed to be bound by the rules.

At a hearing on the competing motions, Tenconi argued the Deans had failed to show the existence of a valid binding arbitration agreement. He did not disagree with Zelis’s characterization of what the arbitrator stated at the beginning of the arbitration, but pointed out the arbitrator did not use the word “binding.”

Zelis argued it was “disingenuous” and “just totally unbelievable” for Tenconi and his clients, who are “sophisticated business people,” to say they thought the arbitration was “ ‘just . . . some kind of a mediation process to help us settle the case,’ ” when the case had been going on since 2011 and the parties had already participated in mediation. Zelis explained that defendants were the ones who suggested binding arbitration as a way to save court time and costs. Zelis reiterated that the arbitrator “very clearly pointed out” that he would be making a decision as a judge, and that defendants, who were present when the arbitrator made that statement, nevertheless paid for and fully participated in the arbitration.

The trial court stated, “I am going to think about this. But . . . from a waiver standpoint and the fact that someone actually spends the money and the time going through an arbitration, not knowing that it’s going to be binding . . . just doesn’t compute. . . . [T]here’s a credibility gap here. And particularly when the attorney is saying, ‘Yes, this . . . will be binding arbitration.’ [¶] . . . [T]he Court has the authority to order cases to non-binding arbitration. . . . And I don’t see that anyone ever requested non-binding arbitration. And, although, I guess parties can agree to arbitrate cases any way they choose[,] [t]here really is nothing in the Code that talks about non-binding arbitration, except the judicially-ordered [kind]. [¶] So I want to think about this some more, but that’s kind of my thoughts at the moment. So I will take it under submission. I’ll send out a ruling, and it will be more specific as to findings.” Neither party requested a statement of decision.

The following month, the trial court issued a judgment granting the petition to confirm the award and denying the petition to vacate. The judgment did not contain any specific findings.

DISCUSSION

1. Binding Arbitration Agreement

Defendants contend the trial court erred in determining there was a valid binding arbitration agreement. We disagree.

“Private arbitration . . . ‘is a procedure for resolving disputes which arises from contract’ . . . Contractual arbitration awards, if valid, are presumed to be binding and final.” (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1218 & fn. 7 [“Judicial arbitration, in contrast, . . . (absent the parties’ agreement to the contrary) is *not* final since a party may elect trial de novo after arbitration”].) Thus, “ ‘[w]hen parties agree to leave their dispute to an arbitrator, they are presumed to know that his award will be final and conclusive’ ” (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10.)

“Judicial intervention in the private arbitration process is strictly limited because the parties have agreed to ‘bypass the judicial system’ . . . and submit their dispute to ‘nonjudicial resolution by an independent third person or persons’ By agreeing to arbitration, parties anticipate a relatively speedy, inexpensive and final resolution Consequently, ‘as a general rule courts will indulge every reasonable intendment to give effect to arbitration proceedings.’ ” (*Toal v. Tardif, supra*, 178 Cal.App.4th at p. 1218, citations omitted.)

To establish a valid agreement to arbitrate, the party trying to enforce the arbitration must file a petition “accompanied by prima facie evidence of a written agreement to arbitrate” (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) The trial court then determines “whether the agreement exists, and if any defense to its enforcement is raised, whether it is enforceable [T]he petitioner bears the burden of proving [the] existence [of an agreement] by a preponderance of the evidence,” and “the party opposing the petition . . . bears the burden of producing

evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense.” (*Ibid.*)

Here, defendants do not dispute the parties agreed to arbitrate the case, but they argue their attorney lacked the authority to agree to *binding* arbitration on their behalf. When an attorney agrees to binding arbitration on a client’s behalf but the client does not sign the agreement or otherwise expressly manifest consent, a party seeking confirmation of a resultant arbitral award must prove the client consented to binding arbitration in one of two ways: by authorizing counsel to agree or by subsequently ratifying counsel’s agreement. (*Toal v. Tardif, supra*, 178 Cal.App.4th at p. 1221; cf. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 400, 407 [attorney lacked authority to commit client to binding arbitration where client objected, fired attorney, and hired new counsel to file a motion to invalidate the binding arbitration agreement].)

We review an order confirming an arbitration award de novo, but to the extent it rests on a determination of disputed factual issues, “ ‘we apply the substantial evidence test to those issues.’ ” (*Toal v. Tardif, supra*, 178 Cal.App.4th at p. 1217.) In doing so, “[w]e may not reweigh the evidence and [we] are bound by the trial court’s credibility determinations.” (*Estate of Young* (2008) 160 Cal.App.4th 62, 76.) It does not matter that the court based those credibility determinations on declarations rather than live testimony. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.) As with all appeals, the appellant bears the burden of affirmatively showing error. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

Here, by confirming the arbitration award, the trial court implicitly found that defendants either authorized Tenconi to send the email or they ratified Tenconi’s agreement. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 [the doctrine of implied finding requires us to “ ‘infer . . . that the trial court impliedly made every factual finding necessary to support its decision’ ”].) Because this determination rested on factual disputes, we view the court’s ruling for substantial evidence.

Viewing the evidence in the light most favorable to the judgment (*Sandoval v. Qualcomm Inc.* (2018) 28 Cal.App.5th 381, 411–412), we conclude there was substantial

evidence to support the trial court's findings. Defendants rely on *Toal v. Tardif, supra*, 178 Cal.App.4th at page 1213, in which the attorney's signed agreement to arbitrate, "standing alone," was not enough. Here, however, there was more.

By the time Tenconi wrote to Zelis "confirm[ing] that we have agreed to binding arbitration," the parties had engaged in various settlement efforts, including mediation. Tenconi did not state he would be requesting a stay of the proceedings pending further settlement efforts; rather, he indicated the parties "will not move forward with the trial" because they were going to "binding arbitration" Zelis asserted—and Tenconi did not deny—that it was defendants who suggested binding arbitration as a cost-effective and conclusive way to resolve the case. Defendants offered to—and did in fact—pay for the arbitration, and attended and testified at the arbitration. The arbitrator informed everyone that he would be acting as a judge and issuing a decision, and thereafter issued a final award finding defendants owed the Deans \$165,835.62 plus further interest "until the date this Award is satisfied." Tenconi made no effort to retract the "agree[ment] to binding arbitration" at any time or to inform anyone that his clients did not agree to binding arbitration, even after he received the JAMS confirmation letter referencing the JAMS Streamlined Rules that apply to "binding" arbitration.

The evidence defendants presented also did not assist them, as the trial court found there was a "credibility gap." Tenconi declared that he "always believed" the arbitration would be "non-binding," and that when he sent the email "agree[ing] to binding arbitration," his clients had not authorized him to do so. However, he made no effort to withdraw his agreement, nor did he ever inform or even indicate to any of the key players—JAMS, the arbitrator, or Zelis—that his clients did not agree to binding arbitration. Amado and Hinchman's declarations provided that they never agreed to—or authorized anyone to agree to—binding arbitration, but the declarations contained no details or explanation as to how they formed their alleged belief that the arbitration would be nonbinding. Tenconi, Amado, and Hinchman all declared that they saw the arbitration simply as a settlement tool, but the court could reasonably discredit this testimony given that the parties had already engaged in various failed settlement efforts, the matter had

been set for trial, and defendants objected to the “binding” nature of the arbitration only after the arbitrator issued an award that was unfavorable to them. There was substantial evidence to support the court’s finding that there was a valid agreement for binding arbitration.

2. Statement of Decision

Defendants contend that if we do not reverse on the merits, we must remand the case for the trial court to issue a statement of decision. We disagree.

When a trial court rules on a petition to confirm an arbitration award that involves questions of fact, as this one did, it must, upon timely request, issue a statement of decision. (Code Civ. Proc., § 1291.) If, as here, a matter is tried in less than a day, a party must (1) request a statement of decision before the matter is submitted and then (2) object to any omission in the proposed statement, or else the party’s appeal will trigger the doctrine of implied findings (Code Civ. Proc., §§ 632, 634), and the reviewing court will determine whether substantial evidence supports those implied findings (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148–1149).

Here, neither party requested a statement of decision before the trial court took the matter under submission. The parties’ decision not to request a statement of decision may have been understandable in light of the court’s statement that it would provide more specific findings. However, once the court issued a judgment that contained no specific findings, defendants should have—but did not—bring the matter to the court’s attention or request a statement of decision. (See *In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1011 [party had a right to a statement of decision where she brought it to the court’s attention when a statement of decision was not forthcoming].) The court therefore had no duty to provide specific findings, and defendants’ appeal is subject to the doctrine of implied findings. We decline to remand the matter.

DISPOSITION

The judgment is affirmed. The Deans shall recover their costs on appeal.

Jenkins, J.

WE CONCUR:

Siggins, P. J.

Pollak, J.*

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* On Monday, November 26, 2018, the Commission on Judicial Appointments confirmed the Governor's appointment of Justice Pollak as the Presiding Justice of Division Four of this court.